2009

State of Utah v. Harold Earl Bushman : Brief of Appellee

Utah Court of Appeals

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Case No. 20080979-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

HAROLD EARL BUSHMAN,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for one count of securities fraud and six counts of attempted securities fraud, in the Fourth Judicial District Court of Utah, Utah County, the Honorable Samuel McVey presiding.

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for one count of securities fraud, a third degree felony, and six counts of attempted securities fraud, all class A misdemeanors. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2009).

STATEMENT OF THE ISSUE

The Double Jeopardy Clause protects against the imposition in successive proceedings of multiple *criminal* punishments for the same offense. Following administrative proceedings on his violations of securities laws, the Utah Division of Securities ordered that Defendant cease and desist and imposed a fine.

Issue: Was the fine a criminal punishment, thus precluding prosecution and punishment for the violations in subsequent criminal proceedings?

Standard of review: "Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction." *See Hudson v. United States*, 522 U.S. 93, 99 (1997). It is also a "question of constitutional interpretation." *State v. Arbon*, 909 P.2d 1270, 1271 (Utah App. 1996). Issues of statutory construction and constitutional interpretation are both legal questions, reviewable for correctness. *See Arbon*, 909 P.2d at 1271; *see also State v. Timmerman*, 2009 UT 58, ¶ 7, ___ P.3d ___.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant statutes are included in the Addendum:

Utah Code Ann. § 61-1-20 (West 2004) (Enforcement);
Utah Code Ann. § 61-1-21 (West 2004) (Penalties for violations).

STATEMENT OF THE CASE

Defendant was charged by information with one count of having engaged in a pattern of unlawful activity, a second degree felony, in violation of Utah Code Ann. § 76-10-1603 (West 2004); one count of securities fraud, a second degree felony, in violation of Utah Code Ann. § 61-1-1 (West 2004); and ten counts of securities fraud, a third degree felony, in violation of Utah Code Ann. § 61-1-1 (West 2004). R1-5.

Defendant moved to dismiss the case, claiming that the prosecution violated the Double Jeopardy Clause of the United States Constitution because the Utah Securities Division had previously issued a cease and desist order and an order to show cause based on the same conduct and because, in resolving that administrative case, Defendant and the Division had entered into a stipulation and consent order

requiring Defendant to pay a fine. *See* R103-11. The State opposed, arguing that the fine was part of a civil remedy, not a punishment, and that Defendant had not been placed in jeopardy during the administrative proceedings that resulted in the fine. *See* R112-18. After hearing argument on the motion, the trial court denied it. *See* R186-87; R232:14-16.

Defendant then entered a guilty plea, reserving his right to challenge the denial of his motion to dismiss. R189-202. Defendant pled guilty to one count of securities fraud, a third degree felony, and to six counts of attempted securities fraud, all class A misdemeanors. *Id.* The State dismissed the remaining counts. *See id.*

On October 20, 2008, the trial court entered judgment, imposing an indeterminate prison term of zero to five years on Defendant's conviction for securities fraud, but suspending the prison term and imposing a five-day jail term. *See* R210. The court imposed one-year jail terms on Defendant's six convictions for attempted securities fraud, to be served consecutively, but suspended all terms. *See id.*; *see also* R234:9-11. The court placed Defendant on probation for 204 months and imposed a fine of $5000 on Defendant's felony conviction and fines of $2500 on each of Defendant's misdemeanor convictions, but apparently suspended all but $1100 in fines, including surcharges. R234:9-10; R207-11.

On November 20, 2008, Defendant filed both a notice of appeal, R216, and a motion to extend for good cause the time for appeal, R217. The trial court granted the motion to extend. R220. Defendant's appeal is therefore timely. *See* Utah R. App. P. 4(e) (trial court "may extend time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by [rule 4(a), i.e., within 30 days after the date of the entry of the judgment]").

STATEMENT OF FACTS

Defendant was charged for conduct involving his solicitation of investments and loans from several individuals.

Dealings with Darold Jensen. In approximately September 2002, Defendant met Darold Jensen. R230:5-7. Defendant told Jensen that he had just sold 50,000 shares of Sun Micro stock for $5.26 a share and would receive the proceeds in about two months. R230:6. Defendant asked Jensen for a $30,000 loan, stated he would repay him before January 6, 2003, and offered to pay 20 percent interest on the loan. R230:6-8. The parties signed a written agreement, and Jensen gave Defendant the $30,000. R230:8-9 (referencing State's Exhibit 1). Jensen called Defendant approximately one year later, asking for his money. R230:9. Five years later, at the time of the preliminary hearing, Jensen still had received nothing. R230:9-10.

Transactions with Jeff Jermaine. In March 2005, Defendant asked Jeff Jermaine for a $5000 loan to pay for some family expenses. R230:14. On March 21,

2005, Defendant gave Jermaine a promissory note, promising to repay the $5000 loan with 10 percent interest on July 1, 2005. R230:14-15, 19 (referencing State's Exhibit 3). Defendant told Jermaine that he was expecting a judgment or settlement in a medical malpractice action from which he would make the repayment. R230:15. On May 6, 2005, Defendant asked Jermaine for additional funds. R230:15-16. Jermaine lent him an addition $1800, to be repaid on May 11, 2005. R230:16-17. Defendant paid back the principal on the loans about a year later. R230:18. Defendant did not make any interest payments. R230:19.

Dealings with Randy Porter. On approximately March 7, 2006, Randy Porter lent Defendant between $250 and $750. R230:21-22. Defendant said he needed the money to purchase a gift for his wife. R230:21-22. Defendant repaid this loan on a timely basis. R230:22.

A few weeks later, Defendant called Porter. R230:23. He told Porter that Oracle was giving him $80,000 in stock options for his consulting services that year. *Id.* Defendant said that because he was a consultant, he received the options for about 15 percent below market value, but could exercise them the same day for a 15 percent gain. R230:23-24. Defendant said he was "only going to be able to do about [$]70,000." R230:24. Defendant told Porter that if he wanted to put in $2500 or $3000, Defendant could get him a 15 percent return in a month and a half. R230:24. Defendant said that "the whole process would take about a month and a half

because it had to clear and everything." *Id.* Defendant also agreed to pay the taxes and give Porter the cash. *Id.* Porter invested $3000 in mid-May 2006. R230:29.

Porter invested money with Defendant three other times. R230:29. He invested $2500 with Defendant to buy silicone chips from one company and sell them to another. R230:30. In approximately June 2006, Defendant called Porter to tell him that his money was ready, but asked if Porter would like to roll it over and also invest another $2500. *Id.* Porter invested again. *Id.* Defendant then called asking for another $5000, but Porter could only come up with $1000. R230:32. Porter was uncertain about these individual amounts, but testified that he paid out a total of about $12,000. R230:42.

Defendant repaid the money, with the interest, in approximately September 2006. R230:34.

Dealings with Steven Sandstrom. Defendant originally asked Steven Sandstrom to invest in truck parts, stuck in customs in Mexico, that, when released, would generate a large profit. R230:45. Sandstrom gave Defendant a check for $2500, but then stopped payment on the check. *Id.*

In the fall of 2006, Defendant approached Sandstrom, saying that he had previously worked for Sun Microsystems and had some very favorable stock options, but was short on money to exercise them. R230:46. Defendant asked for $3000, which he promised to return with $240 in interest in two weeks. R230:47.

Sandstrom gave him the $3000. *Id.* A month later, Defendant asked for more money, saying that something had happened with the options. *Id.* Sandstrom wrote Defendant a check for $4000. R230:48. When he did not repay the money, Defendant gave Sandstrom a document stating that Defendant owed him $7,700, plus a late penalty, for a total of $9000. R230:49. A year and a half later, after Sandstrom's lawyer wrote Defendant telling him that he would contact the Attorney General's Office unless he repaid the money, Sandstrom received $7,700, but no additional interest or late payment fee. R230:50.

Dealings with Floyd Richey. Floyd Richey testified that Defendant first approached him about an investment in the early 2000's. R230:54. The investment offer "was about the microchips out of Ireland or somewhere." *Id.* Richey did not invest at that time. *Id.* In late 2006 or 2007, Defendant again approached Richey first with a chip deal and then with a high-interest cash deal, but Richey declined both offers. R230:55-56.

Investigation by Susan Jones. Susan Jones, an investigator with the Utah Division of Securities, investigated Defendant's transactions with the investors. R230:58. She testified that while Defendant told some investors that he had stock options in Intel and Sun Microsystems, affidavits from those companies stated they had no records of those options. R230:59-60. She also testified that while Defendant told some investors that he would repay them with the proceeds from a pending

medical malpractice suit, he did not tell them that the proceeds from that action, if any, were already committed. R230:59.

Jones noted that some of the transactions involved promissory notes. R230:58. She testified that non-collateralized promissory notes are presumed to be securities, which should have been registered, but were not. R230:58-59, 62, 65. She also testified that Defendant was not licensed to sell securities, but failed to tell the investors that he was not licensed. R230:61-62.

SUMMARY OF ARGUMENT

The fine imposed by the Division of Securities was a civil sanction. A sanction is civil if the legislature intends that it be civil and if the effects of the sanction are not so punitive as to render it criminally punitive in the double jeopardy context. Only the "clearest proof" suffices to show that a sanction intended by the legislature to be civil is criminally punitive.

Here, the legislature, by giving an administrative agency authority to impose a fine, indicated its intent that the sanction be civil. For the following reasons, the effects of the fine were not so punitive as to transform it into a criminal penalty: (1) monetary penalties have not historically been viewed as punishment; (2) a fine does not impose any affirmative disability or restraint comparable to imprisonment; (3) the fine comes into play without regard to a finding of scienter; (4) while the conduct for which the fine was imposed may also be criminal, that fact does not

render the fine criminally punitive; and (5) while the fine may deter others from similar conduct, deterrence may serve civil, as well as criminal, goals.

Because the fine here was a civil sanction, Defendant's subsequent criminal punishment for securities violations was not a successive *criminal* punishment and did not violate the Double Jeopardy Clause of the Fifth Amendment.

ARGUMENT

BECAUSE THE FINE IMPOSED BY THE DIVISION OF SECURITIES IN ADMINISTRATIVE PROCEEDINGS WAS A CIVIL SANCTION, IT DID NOT BAR PROSECUTION AND PUNISHMENT OF DEFENDANT IN SUBSEQUENT CRIMINAL PROCEEDINGS

Defendant claims that his "conviction should be reversed because [the] prosecution was barred in this matter based on double jeopardy." Br. Appellant at 10 (boldface and capitalization omitted). He raises his claim under the Double Jeopardy Clause of the Fifth Amendment. *See id.* at 10-16. He asserts that the fine imposed in his administrative case was "not solely civil in nature," that it was a criminal penalty, and that the State was therefore "precluded by Double Jeopardy from once again pursuing criminal charges and penalties." *Id.* at 13-14 (capitalization and underlining omitted). He further argues that "even if the legislature intended the remedy to be civil, it is punitive and triggers the protections of the Double Jeopardy Clause." *Id.* at 14 (boldface, capitalization, and underlining

omitted). However, under controlling law, the administrative fine was a civil penalty. Therefore, Defendant cannot prevail on his double jeopardy claim.

Relevant law. The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." In *Hudson v. United States*, 522 U.S. 93 (1997), the United States Supreme Court noted that it has "long recognized that the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, '"in common parlance,"' be described as punishment." *Id.* at 98-99 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943), in turn quoting *Moore v. Illinois*, 14 How. 13, 19, 14 L.Ed. 306 (1852)). Rather, "[t]he Clause protects only against the imposition of multiple *criminal* punishments for the same offense," *id.* at 99 (citing *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (additional citations omitted) (emphasis in *Hudson*), and "then only when such occurs in successive proceedings," *id.* (citing *Missouri v. Hunter*, 459 U.S. 359, 366 (1983)).

Hudson is the most recent United States Supreme Court case to focus on the double jeopardy implications of administrative sanctions and is controlling law in this case. The *Hudson* Court addressed monetary penalties and occupational debarment imposed by the Office of the Comptroller of the Currency (OCC) on bank officers for violating banking laws. *See* 522 U.S. at 93. In so doing, the Court outlined a two-prong test for determining "[w]hether a particular punishment is

criminal or civil." *Id.* at 99. First, a court must "ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.'" *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)). Then, "[e]ven in those cases where the legislature 'has indicated an intention to establish a civil penalty,'" (quoting *Ward*, 588 U.S. at 248-49), a court must also ask, "'whether the statutory scheme was so punitive either in purpose or effect' as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty,'" *id.* (quoting *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956)).[1]

The Court further observed, "In making this latter determination, the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 ... (1963), provide useful guideposts." *Id.* Those factors include: "(1) '[w]hether the sanction involves an

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[1] *Hudson* followed *United States v. Halper*, 490 U.S. 435 (1989), which in turn followed *Ward*, 448 U.S. at 242. The *Hudson* court held "that the Double Jeopardy Clause of the Fifth Amendment is not a bar to the later criminal prosecution because the [prior] administrative proceedings were civil, not criminal." 522 U.S. at 95-96. But the Court stated that in so doing, it disavowed in large part "the method of analysis used in [*Halper*] and reaffirm[ed] the previously established rule exemplified in [*Ward*]." *Id.* at 96.

Citation to *Halper* and authority relying on *Halper* should therefore be viewed with caution. *State v. Arbon*, 909 P.2d 1270 (Utah App. 1996), and *State v. Mendoza*, 938 P.2d 303 (Utah App. 1997), referenced by Defendant in his brief, were decided when *Halper* was controlling authority, and therefore employ an analysis that is no longer wholly viable.

affirmative disability or restraint'; (2) 'whether it has historically been regarded as a punishment'; (3) 'whether it comes into play only on a finding of *scienter*'; (4) 'whether its operation will promote the traditional aims of punishment—retribution and deterrence'; (5) 'whether the behavior to which it applies is already a crime'; (6) 'whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) 'whether it appears excessive in relation to the alternative purpose assigned.'" *Id.* at 99-100 (quoting *Kennedy*, 372 U.S. at 168-69). But, the Court cautioned, "It is important to note ... that 'these factors must be considered in relation to the statute on its face,'" *id.* at 100 (citing *Kennedy*, 372 U.S. at 169), and "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *id.* (citing *Ward*, 448 U.S. at 249) (additional quotation marks omitted).

The *Hudson* Court held that the monetary penalties and occupational debarment imposed by the OCC were civil sanctions. 522 U.S. at 105. The Court therefore concluded that criminal prosecution and punishment of the bank officers would not violate the Double Jeopardy Clause by imposing a successive criminal punishment. *Id.*

In reaching this result, the Court first concluded, "It is evident that Congress intended the OCC money penalties and debarment sanctions imposed for violations of [relevant United States code sections] to be civil in nature." *Id.* at 103. The Court

reasoned that "[w]hile the provision authorizing debarment contains no language explicitly denominating the sanction as civil," it is "significant that the authority to issue debarment orders is conferred upon the appropriate Federal banking agenc[ies]." *Id.* (internal quotation marks and citation omitted) (alteration in *Hudson*). The Court stated, "That such authority was conferred upon administrative agencies is prima facie evidence that Congress intended to provide for a civil sanction." *Id.*

Turning to the second prong of the test, i.e., whether the effects of the money penalties or debarment sanctions were "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary," the Court found "little evidence, much less the clearest proof that we require," *id.* at 104, to "override Congress' intent and transform what had been denominated a civil remedy into a criminal penalty," *id.* at 100 (quoting *Ward*, 448 U.S. at 249).

The Court explained: "First, neither money penalties nor debarment has historically been viewed as punishment." *Id.* at 104. "Second, the sanctions imposed do not involve an 'affirmative disability or restraint'" – "certainly nothing approaching the 'infamous punishment' of imprisonment." *Id.* at 104 (internal quotation marks and citation omitted). "Third, neither sanction comes into play 'only' on a finding of scienter," that is, money penalties are allowable "without regard to the violator's state of mind." *Id.* Fourth, while the conduct for which the

OCC sanctions are imposed may also be criminal, that fact "is insufficient to render the money penalties and debarment sanctions criminally punitive." *Id.* at 105. Finally, although the Court recognized that the imposition of monetary penalties and debarment sanctions would deter others from similar conduct—"a traditional goal of criminal punishment," the Court nevertheless concluded that "the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence 'may serve civil as well as criminal goals.'" *Id.* (internal citations omitted).

"In sum," the Court held, "there simply is very little showing, to say nothing of the 'clearest proof' required ... that OCC money penalties and debarment sanctions are criminal." *Id.* As a result, the Double Jeopardy Clause constituted "no obstacle to [the bank officers'] trial on the pending indictments." *Id.*

Analysis. Here, the sanctions imposed and their attendant circumstances are very similar to those in *Hudson*. The Utah Uniform Securities Act, Utah Code Ann.

§§ 61-1-1 to -30, establishes civil proceedings and sanctions for securities violations and also defines criminal offenses based on such violations.[2]

Section 61-1-20 provides that "[w]henever it appears to the director [of the Division of Securities] that any person has engaged, is engaging, or is about to engage in an act or practice constituting a violation of this chapter or any rule or order under this chapter, in addition to any specific powers granted in this chapter ... the director may issue an order directing the person to appear before the division and show cause why an order should not be issued directing the person to cease and desist." Utah Code Ann. § 61-1-20 (West 2004). It also provides that "after a hearing, the director may issue an order to cease and desist from engaging in any act or practice constituting a violation," "impose a fine," or suspend that person from associating with a licensed broker-dealer or investment adviser in this state." Utah Code Ann. § 61-1-20(1)(e), (f), & (g).

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[2] Section 61-1-20 ("Enforcement") governs administrative proceedings and sanctions; section 61-1-21 ("Penalties for violations") defines criminal offenses. The separate provisions are similar to those in *Hudson* where Congress provided for civil proceedings and penalties for violations of banking laws in one title of the United States Code and defined criminal violations for violations of those laws in another. *See Hudson*, 522 U.S. at 96-97.

The legislature's authorization of administratively imposed sanctions demonstrates that those sanctions are civil in nature. As *Hudson* held, "That such authority was conferred upon administrative agencies is prima facie evidence that [the Utah legislature] intended to provide for a civil sanction." 522 U.S. at 103. Thus, the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference" that a civil label be applied to the sanctions imposed by the Division of Securities. *Hudson*, 522 U.S. at 99 (internal quotation marks omitted). This satisfies the first prong of the *Hudson* test.

The legislative scheme also meets the second prong of the *Hudson* test. The same factors that demonstrated that the administrative sanctions in *Hudson* were not so punitive in form and effect as to render those sanctions criminal are present in this case. First, as explained, the sanction here was a fine—a monetary penalty. As explained in *Hudson*, monetary penalties have not "historically been viewed as sanctions." *Id.* at 104. Second, neither the cease and desist order nor the fine imposed "an affirmative disability or restraint," "certainly nothing approaching the 'infamous punishment' of imprisonment." *Id.* (internal quotation marks and citation omitted). Third, the administratively-imposed sanction did not "come[] into play 'only' on a finding of scienter," that is, the fine was allowable "without regard to the violator's state of mind." *Id.* at 104; *see also* Utah Code Ann. § 61-1-20. By contrast, the statute defining criminal offenses for securities violations requires a "willful"

and/or "knowing" mental state. *See* Utah Code Ann. § 61-1-21. Fourth, while the conduct for which the Securities Division sanctions are imposed may also be criminal, as was the conduct in *Hudson*, that fact "is insufficient to render the money penalt[y] ... criminally punitive." *Hudson*, 522 U.S. at 105. Finally, while the fine imposed here may deter others from similar conduct – a traditional goal of criminal punishment – "the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence 'may serve civil as well as criminal goals.'" *Id.* (internal citations omitted).

The two other *Kennedy* factors mentioned, but not discussed at length in *Hudson*, also support a conclusion that the fine here was more remedial than punitive. First, the $19,300 fine imposed was reducible "dollar for dollar for any money paid to the victims" within twelve days of the Division's order. R249. Moreover, if Defendant paid the full amount to the victims by that date, half of the remaining $5000 fine was waived. *Id.* Thus, there was "an alternative purpose to which [the fine] may rationally [have] be[en] connected," i.e., encouraging Defendant's repaying his victims in a timely manner. *Hudson* at 99 (quoting *Kennedy*, 372 U.S. at 169) (internal quotation marks omitted). Second, the fine was not "excessive in relation to the alternative purpose." *Id.* at 99-100 (quoting *Kennedy*, 372 U.S. at 169) (internal quotation marks and citation omitted).

In sum, here, as in *Hudson*, application of the *Kennedy* factors demonstrates that the statutory scheme was not "so punitive either in purpose or effect" as to transform what the legislature "intended as a civil remedy into a criminal penalty." *Id.* at 99 (internal quotation marks and citations omitted). Under controlling law, the sanctions imposed by the Division of Securities are thus civil sanctions, and the punishment imposed on Defendant following his criminal conviction was not a successive criminal punishment and did not violate the Double Jeopardy Clause.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted October 26, 2009.

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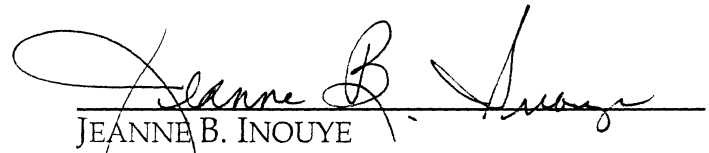

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A digital copy of the brief was also included: ☑ Yes ☐ No

Melissa Ince

Addendum

statement in writing, under oath or otherwise as to all the facts and circumstances concerning the matter to be investigated.

(c) The division may publish information concerning any violation of this chapter or the violation of any rule or order hereunder.

(2) For the purpose of any investigation or proceeding under this chapter, the division or any employee designated by it may:

(a) administer oaths and affirmations;

(b) subpoena witnesses and compel their attendance;

(c) take evidence; and

(d) require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records relevant or material to the investigation.

Laws 1963, c 145, § 1, Laws 1979, c. 218, § 6; Laws 1983, c. 284, § 28; Laws 1990, c. 133, § 12

Historical and Statutory Notes

Uniform Law

This section is similar to § 407 of the Uniform Securities Act (1956) See Volume 7C Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw

Cross References

Perjury, falsification in official matters, see § 76-8-501 et seq

Library References

Securities Regulation ⇨274
Westlaw Key Number Search 349Bk274.
C J S Securities Regulation §§ 413, 415

§ 61-1-20. Enforcement

Whenever it appears to the director that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of this chapter or any rule or order under this chapter, in addition to any specific powers granted in this chapter:

(1)(a) the director may issue an order directing the person to appear before the division and show cause why an order should not be issued directing the person to cease and desist from engaging in the act or practice, or doing any act in furtherance of the activity;

(b) the order to show cause shall state the reasons for the order and the date of the hearing;

(c) the director shall promptly serve a copy of the order to show cause upon each person named in the order;

(d) the director shall hold a hearing on the order to show cause no sooner than ten business days after the order is issued;

(e) after a hearing, the director may issue an order to cease and desist from engaging in any act or practice constituting a violation of this chapter or any rule or order under this chapter. The order shall be accompanied by written findings of fact and conclusions of law;

(f) the director may impose a fine; and

(g) the director may bar or suspend that person from associating with a licensed broker-dealer or investment adviser in this state.

(2)(a) The director may bring an action in the appropriate district court of this state or the appropriate court of another state to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order under this chapter;

(b) upon a proper showing in an action brought under this section, the court may:

(i) issue a permanent or temporary, prohibitory or mandatory injunction;

(ii) issue a restraining order or writ of mandamus;

(iii) enter a declaratory judgment;

(iv) appoint a receiver or conservator for the defendant or the defendant's assets;

(v) order disgorgement;

(vi) order rescission;

(vii) impose a fine of not more than $500 for each violation of the act; and

(viii) enter any other relief the court considers just; and

(c) the court may not require the division to post a bond in an action brought under this subsection.

Laws 1963, c 145, § 1; Laws 1983, c 284, § 29, Laws 1986, c 107, § 1, Laws 1990, c. 133, § 13, Laws 1994, c. 12, § 70.

Historical and Statutory Notes

Uniform Law

This section is similar to § 408 of the Uniform Securities Act (1956) See Volume 7C Uniform Laws Annotated, Master Edition or ULA Database on Westlaw

Cross References

Complaint for declaratory judgment, see Rules Civ Proc , Form 8
Complaint for injunctive relief see Rules Civ Proc., Form 9
Declaratory judgments generally, see § 78-33-1 et seq
Declaratory judgments, see Rules Civ Proc , Rule 57
Extraordinary writs, judicial code, see § 78-35-1 et seq
Mandamus and prohibition, see § 78-35-9
Receivers see Rules Civ Proc , Rule 66

Securities Regulation ⇔ 274, 277, 291
Westlaw Key Number Searches 349Bk274, 349Bk277, 349Bk291

415 to 416, 418, 428 to 429.

Notes of Decisions

Review 1

1. Review

Upon determining that firm had unlawfully distributed shares of stock without registration, Utah Securities Advisory Board was authorized to suspend all secondary trading exemptions of stock involved, Board's citation of technically inapplicable statute when it issued suspension order was harmless error in that order was nevertheless statutorily authorized. U C A. 1953, 61-1-7, 61-1-20 Capital General Corp. v Utah Dept of Business Regulation, Securities Div., 1989, 777 P 2d 494, certiorari denied 781 P 2d 878 Administrative Law And Procedure ⇔ 764 1, Securities Regulation ⇔ 277

§ 61-1-21. Penalties for violations

(1) A person is guilty of a third degree felony who willfully violates any provision of this chapter except Sections 61-1-1 and 61-1-16, or who willfully violates any rule or order under this chapter, or who willfully violates Section 61-1-16 knowing the statement made to be false or misleading in any material respect.

(2) A person who willfully violates Section 61-1-1:

(a) is guilty of a third degree felony if, at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth less than $10,000;

(b) is guilty of a second degree felony if:

(i) at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth $10,000 or more; or

(ii)(A) at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth less than $10,000; and

(B) in connection with that violation, the violator knowingly accepted any money representing:

(I) equity in a person's home;

(II) a withdrawal from any individual retirement account; or

(III) a withdrawal from any qualified retirement plan as defined in the Internal Revenue Code;[1] or

(c) is guilty of a second degree felony punishable by imprisonment for an indeterminate term of not less than three years or more than 15 years if:

(i) at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth $10,000 or more; and

(ii) in connection with that violation, the violator knowingly accepted any money representing:

(A) equity in a person's home;

(B) a withdrawal from any individual retirement account; or

(C) a withdrawal from any qualified retirement plan as defined in the Internal Revenue Code.

(3) No person may be imprisoned for the violation of any rule or order if he proves that he had no knowledge of the rule or order.

(4) In addition to any other penalty for a criminal violation of this chapter, the sentencing judge may impose any penalty or remedy provided for in Subsection 61-1-20(2)(b).

Laws 1963, c 145, § 1; Laws 1971, c 155, § 1; Laws 1983, c 284, § 30; Laws 1990, c 133, § 14, Laws 1991, c 161, § 12; Laws 1992, c. 216, § 4, Laws 1997, c. 160, § 10, eff May 5, 1997; Laws 2001, c. 149, § 1, eff. April 30, 2001.

[1] See 26 U S C A § 1 et seq

Historical and Statutory Notes

Uniform Law

This section is similar to § 409 of the Uniform Securities Act (1956) See Volume 7C Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw

Cross References

Attempt, elements and classification, see §§ 76-4-101 and 76-4-102
Conspiracy and solicitation, elements and penalties, see § 76-4-201 et seq
Fines upon conviction of misdemeanor or felony, see § 76-3-301.
Inchoate offenses, limitations on sentencing, see §§ 76-4-301 and 76-4-302
Penalties for felonies, see § 76-3-203
Right to trial by jury, see Const Art 1, § 10.

Library References

Securities Regulation ⇨321.
Westlaw Key Number Search. 349Bk321.
C J S Securities Regulation §§ 445 to 446

Notes of Decisions

1. Construction and application

Statute requiring that individual act "willfully" to be criminally liable for securities fraud does not require "scienter," the intent to deceive, manipulate or defraud U C A 1953, 61-1-1(2), 61-1-21 State v Larsen, 1993, 865 P 2d 1355 Securities Regulation ⇨ 323

2. Limitation of actions

Five-year statute of limitations set forth in Securities Act applied to defendant s criminal prosecution for securities fraud, rather than four-year general felony limitation period U C A 1953, 61-1-21, 76-1-103(1), 76-1-302(1)

3. Expert testimony

Securities expert s use of word "material" during testimony was not improper instruction to jury on law in securities fraud prosecution; although statute under which defendant was prosecuted required finding that information not disclosed was 'material," testimony when read in context seemed to use word 'material" as synonym for "important" U C.A 1953, 61-1-1(2), 61-1-21, Rules of Evid , Rule 702 State v Larsen, 1993, 865 P 2d 1355 Criminal Law ⇨ 469 3

Trial court did not abuse its discretion in determining that expert testimony in securities fraud prosecution would be helpful to jury, where expert expressed opinion that some of material that defendant had omitted from securities documents could have been important or significant to investor, technical nature of securities was not within knowledge of average lay-